

***United States Court of Appeals
for the Second Circuit***

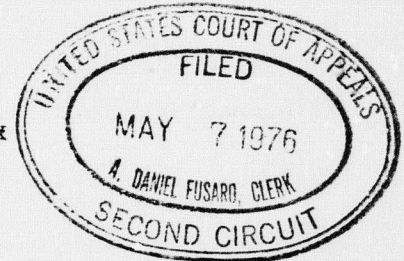


**BRIEF FOR
APPELLANT**

76-7102

To be Argued by
Lloyd Constantine

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



-----x
JOSEPHINE McGRAW, individually and
on behalf of her minor dependent
children and all persons similarly
situated,

Plaintiff-Appellant,

-against-

STEPHEN BERGER, individually and as
Commissioner of the New York State
Department of Social Services,

JAMES DUMPSON, individually and as
Commissioner of the New York City
Department of Social Services, and

THE NEW YORK STATE DEPARTMENT
OF SOCIAL SERVICES,

Defendants-Appellees.
-----x

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF- APPELLANT

JOHN C. GRAY, JR.
LLOYD CONSTANTINE
Of Counsel
Attorneys for Plaintiff-Appella
Brooklyn Legal Services Com
152 Court Street
Brooklyn, New York 11201
(212) 855-8003

To be Argued by
LLOYD CONSTANTINE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
JOSEPHINE McGRAW, individually and
on behalf of her minor dependent
children and all persons similarly
situated,

Plaintiff-Appellant,

-against-

STEPHEN BERGER, individually and as
Commissioner of the New York State
Department of Social Services,

JAMES DUMPSON, individually and as
Commissioner of the New York City
Department of Social Services, and

THE NEW YORK STATE DEPARTMENT OF
SOCIAL SERVICES,

Defendants-Appellees.
-----X

Docket No. 76-7102

BRIEF FOR PLAINTIFF - APPELLANT

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
PREFACE.....	1
QUESTIONS PRESENTED.....	2
STATEMENT OF THE CASE.....	3
STATEMENT OF FACTS.....	5
Statutory Framework.....	6
The Named Plaintiff.....	9
ARGUMENT	
POINT I	
THE COURT BELOW ERRED IN FINDING THAT RECOUPMENT OF NON-FRAUDULENT AFDC OVERPAYMENTS FROM EARNINGS DISREGARDED PURSUANT TO 42 U.S.C. §602 (a) (8) IS CONSISTENT WITH THE SOCIAL SECURITY ACT.....	13
A. The Challenged New York Regulation Violates 42 USC §§602 (a) (7) and 602 (a) (8).....	14
1. The Legislative History and Judicial Interpretation of §602 (a) (8) Reveal That Congress Mandated The Disregard of Specified Earnings, As A Work Incentive, Whenever An Assistance Payment Is Made.....	16
2. The Court Below Erred In Finding That A Temporary Suspension And Diminution of The Work Incentive Did Not Thwart Congressional Intent In Enacting The Earnings Disregard.....	21

TABLE OF CONTENTS (con't)

Page

3. The Court In <u>Johnson v. Likins</u> Correctly Interpreted The Statutory Mandate of §602 (a) (8).....	23
4. The Court Below Erred In Finding That The State Must Apply The Disregard In The "Need" Determination, But May Thereafter Withhold The Disregard By Reduction of The Assistance Payment.....	29
B. HEW's Recoupment Regulation, Permitting The Challenged Practice, Is Invalid.....	33
1. HEW's Current Recoupment Regulation.....	34
2. HEW's Proposed Recoupment Regulation.....	40
POINT II	
THE COURT BELOW ERRED IN REFUSING TO CERTIFY A CLASS PURSUANT TO RULE 23 (c) F.R.C.P. AFTER IT FOUND THAT PLAINTIFF HAD FULFILLED THE PREREQUISITES OF RULE 23 (a) (b) (2) F.R.C.P.....	43
CONCLUSION.....	49
ADDENDUM	
Index To The Record.....	A-1

TABLE OF AUTHORITIES

CASES:

Page No.

<u>Bradford v. Juras</u> , 331 F.Supp. 167 (D. Ore. 1971).....	28
<u>Dandridge v. Williams</u> , 397 U.S. 471 (1970).....	14
<u>Davy v. Sullivan</u> , 354 F.Supp. 1320 (M.D. Ala. 1973).....	47
<u>Engelman v. Amos</u> , 404 U.S. 23 (1971).....	19,20, 22,25,28
<u>Fujishima v. The Board of Education</u> , 460 F.2d 1355 (C.A. 7, 1972).....	47
<u>Galvan v. Levine</u> , 490 F.2d 1255 (C.A. 2, 1973).....	43,44, 45,46
<u>Jefferson v. Hackney</u> , 406 U.S. 535 (1972).....	14,30
<u>Johnson v. Likins</u> , No. 4-75-Civ.-318 (D. Minn., 10/10/75).....	23,24, 28,30,40
<u>Lugo v. Dumpson</u> , 390 F.Supp. 379 (S.D.N.Y., 1975).....	46
<u>Lyons v. Weinberger</u> , 376 F.Supp. 248 (S.D.N.Y., 1974).....	46
<u>Milne v. Berman</u> , 384 F.Supp. 206 (S.D.N.Y., Three-Judge-Court, 1974), rev on other grounds <u>sub. nom.</u> <u>Lavine v. Milne</u> , 44 U.S.L.W. 4295 (U.S. March 2, 1976).....	46
<u>Mr. X v. McCorkle</u> , 333 F.Supp 1109 (D.N.J., Three-Judge-Court, 1970).....	19,20, 28,34
<u>N.W.R.O. v. Mathews</u> , No. 75-1741, F.2d , (C.A. D.C., 2/20/76).....	39

TABLE OF AUTHORITIES (con't)

CASES:

Page No.

<u>N.W.R.O. v. Weinberger</u> , 377 F.Supp. 861 (D.D.C., 1974).....	15,21, 27,39
<u>Percy v. Brennan</u> , 384 F.Supp. 800 (S.D.N.Y., 1974).....	45,47
<u>Rosado v. Wyman</u> , 397 U.S. 397 (1970).....	14,27
<u>Shea v. Vialpando</u> , 416 U.S. 251 (1974).....	7
<u>Sosna v. Iowa</u> , 419 U.S. 393 (1975).....	48
<u>Wilcox v. Commerce Bank of Kansas City</u> , 474 F.2d 336 (C.A. 10, 1973).....	47
<u>Williams v. Lavine</u> , 77 Misc.2d 556, 353 NYS 2d 340 (Sup. Ct. Nassau, 1974).....	31,32
<u>Wilson v. Weaver</u> , 358 F.Supp. 1147 (N.D. Ill., 1973).....	47
<u>Youakim v. Miller</u> , 374 F.Supp. 1204 (N.D. Ill., 1974).....	47

STATUTES:

Civil Rights Acts, 42 U.S.C. §1983.....	3
Child Nutrition Act of 1966, 42 U.S.C. §1771 <u>et. seq.</u>	41
Food Stamp Act, 7 U.S.C. §2011 <u>et. seq.</u>	41
Higher Education Act of 1965, 20 U.S.C. §1001 <u>et. seq.</u>	41
Judicial Code and Judiciary, 28 U.S.C. §1 <u>et. seq.</u>	
28 U.S.C. §1292 (a) (1).....	4
28 U.S.C. §§2201, 2202.....	3

TABLE OF AUTHORITIES (con't)

STATUTES:

Page No.

28 U.S.C. §1343 (3) (4).....	3
National School Lunch Act, 42 U.S.C. §1751 <u>et. seq.</u>	41
New York Social Services Law §131-a (2), (3), McKinneys Consolidated Laws of New York Annotated.....	14
Older Americans Act of 1965, 42 U.S.C. §301 <u>et. seq.</u>	41
Social Security Act, 42 U.S.C. §301 <u>et. seq.</u>	
42 U.S.C. §404.....	42
42 U.S.C. §601.....	6
42 U.S.C. §602 (a) (7).....	7,8,14, 30,31
42 U.S.C. §602 (a) (8).....	5,7,8,10, 13,14,16,19,20,22, 23,24,25,27,28,30, 31,33,34,44,
42 U.S.C. §602 (a) 14.....	19
42 U.S.C. §604.....	6
42 U.S.C. §608 (d).....	19
42 U.S.C. 625.....	19
42 U.S.C. §1383 (b).....	42

REGULATIONS:

Code of Federal Regulations

45 C.F.R. §233.20 (a) (3) (iv) (a).....	7
45 C.F.R. §233.20 (a) (3) (ii) (a).....	8,14,30, 36

TABLE OF AUTHORITIES (con't)

REGULATIONS:

Page No.

45 C.F.R. §233.20(a) (4) (ii) (a), (d), (f).....	41
45 C.F.R. §233.20(a) (7).....	8,14,30
45 C.F.R. §233.20(a) (12) (i) (A) (1).....	15,34,38
45 C.F.R. §233.20(a) (12) (i) (A) (2).....	36
45 C.F.R. §233.20(a) (12) (i) (f).....	35
proposed 45 C.F.R. §§235.15(b) (1) (ii) (A) (2), 235.15(d), 41 Fed. Reg. 8067-8068 (February 24, 1976).....	40,42

New York Code of Rules and Regulations

18 N.Y.C.R.R. §352.1.....	23
18 N.Y.C.R.R. §352.31(d) (1) (ii).....	3,5,9,11, 13,15,33

RULES:

Federal Rules of Civil Procedure

F.R.C.P. 23(a) (b) (2).....	43,44,45, 46,47,48
F.R.C.P. 23(a) (b) (3).....	47
F.R.C.P. 23(c).....	43
F.R.C.P. 57.....	3

Rules of the United States District Courts for the Southern and Eastern Districts of New York, General Rule 9(g).....	4
---	---

MISCELLANEOUS:

<u>Characteristics of State Plans for</u> <u>AFDC Under Title IV-A, H.E.W., S.R.S.,</u> <u>A.P.A., p. 232-233 (1976).....</u>	27
---	----

<u>Hearings Before The Senate Committee</u> <u>On Finance On H.R. 12080, 90th Cong.</u> <u>1st Sess., pt. 1, p. 216 (1967).....</u>	27
---	----

TABLE OF AUTHORITIES (con't)

MISCELLANEOUS:

Page No.

Hearings Before The House Committee
On Ways and Means On H.R. 5710, 90th
Cong. 1st Sess., pt. 1, p. 118 (1967)..... 27

Senate Report No. 744, 90th Cong.
1st Sess. (1967), 1967 U.S. Code
Cong. and Admin. News, pp. 2981, 2982,
2994,2995..... 17, 18

PREFACE

This is an appeal from an order of Judge William C. Conner of the United States District Court for the Southern District of New York. The order dated February 25, 1976, denied plaintiff's motions for a preliminary injunction and class certification and granted summary judgment for defendants.

Judge Conner granted plaintiff's application to prosecute this appeal in forma pauperis in an order dated March 9, 1976. Plaintiff's motion to dispense with an appendix and to proceed on the original record was granted by Judge William H. Timbers in an order dated March 25, 1976. Judge Timber's order further required that appellant would file along with her brief four photo-copies of the parts of the record which appellant will rely on. The parts of the record referred to herein have been compiled and numbered consecutively. For example, the pages of the lower Court's decision 1-18 and a-c are renumbered R-1--R-21, plaintiff's Complaint R-36--R-53, etc. A reference to paragraph 1 of plaintiff's Complaint would be (Ver. Compl. ¶1, R-36) etc. An index to this numbering system is attached as an Addendum to this brief.

QUESTIONS PRESENTED

1. Did the Court below err in finding that 18 New York Code of Rules and Regulations Section 352.31(d)(1)(ii) does not on its face and as applied violate Section 402(a)(8) of the Social Security Act; 42 U.S.C. §602(a)(8).

2. Did the Court below err in refusing to certify a class pursuant to Rule 23(c) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

This action for declaratory and injunctive relief, authorized by 42 U.S.C. §1983, 28 U.S.C. §§2201, 2202, and Rule 57 of the Federal Rules of Civil Procedure, was commenced in the United States District Court for the Southern District of New York on September 25, 1975. Jurisdiction was conferred on the District Court by 28 U.S.C. §1343(3)(4). Plaintiff Josephine McGraw sues on behalf of herself, her nine (9) minor dependent children, and on behalf of a class of working recipients of Aid to Families with Dependent Children and their families, who have had work incentive earned income disregards withdrawn under authority of Title 18 New York Code of Rules and Regulations Section 352.31(d)(1)(ii). These actions were effected pursuant to the challenged New York State welfare regulation by defendants, who are New York State and City welfare officials sued in their individual and official capacities, and the New York State Department of Social Services.

By order to show cause dated September 25, 1975, returnable September 30, 1975, plaintiff McGraw moved for a temporary restraining order and preliminary injunction against enforcement of the challenged regulation and for class certification. On September 30, 1975 at a hearing and conference on plaintiff's motions, Judge William C. Conner denied plaintiff's motion for a temporary restraining order for the purported class and upon the consent of the defendants issued a

temporary restraining order for the named plaintiff pending determination of her motion for a preliminary injunction. Judge Conner indicated that the motion for preliminary injunction would be treated as one for summary judgment.

After plaintiff propounded and defendants answered written interrogatories, and all parties submitted affidavits, memoranda of law, and proposed findings of fact and class definition, in the nature of statements pursuant to Rule 9(g) of the United States District Courts for the Southern and Eastern Districts of New York, Judge Conner denied plaintiff's motions for a preliminary injunction and class certification, and granted defendants summary judgment in a memorandum and order dated February 25, 1975. Notice of Appeal to this Court was filed on March 5, 1975. This Court has jurisdiction of plaintiff's appeal from the denial of an injunction pursuant to 28 U.S.C. §1292 (a) (1).

STATEMENT OF FACTS

This case presents the issue as to whether work incentive income granted to plaintiff McGraw as a working recipient of Aid to Families with Dependent Children ("AFDC"), under a provision of the Social Security Act ("the Act"), can be lawfully withheld by defendants to recoup the amount of an AFDC overpayment made to plaintiff's family due to the administrative error of the local welfare agency. Plaintiff McGraw contends that 18 New York Code of Rules and Regulations ("18 N.Y.C.R.R.") §352.31(d)(1)(ii) which authorizes such withholding of the work incentive earned income disregards, granted working AFDC recipients in §402(a)(8) of the Act, 42 U.S.C. §602(a)(8), is violative of said section of the Act and thus void under the Supremacy Clause.

Members of the class Ms. McGraw seeks to represent are all gainfully employed recipients of AFDC and their families, who are entitled to work incentive income in the form of earned income disregards by virtue of 42 U.S.C. §602(a)(8), and who are having all or part of this statutorily disregarded income withheld by local agencies of the New York State Department of Social Services, to recoup AFDC overpayments made by such agencies because of administrative error or the non-will-full error of the AFDC recipient. (Ver. Compl. ¶s 8-12, R-38-40) Recoupment is being effected under authority of the challenged regulation, 18 NYCRR §352.31(d)(1)(ii).

STATUTORY FRAMEWORK

New York's participation in the Federal grant-in-aid program of AFDC is authorized by the Social Security Act §401 et. seq.; 42 U.S.C. §601 et. seq., which mandates state compliance with specified standards as a condition for receipt of Federal matching funds.¹

The Act defines the sole eligibility requirements which states must impose on recipients of AFDC and prohibits the states from imposing any additional eligibility requirements. While the States define the income levels below which people will be considered "needy", i.e., financially eligible for AFDC, the Social Security Act mandates the standards and procedures for computing the "available income and resources" of applicants and recipients. The "available income" of a given applicant or recipient, i.e., income not exempted, sheltered, or disregarded, for AFDC purposes, computed under the requirements of the Social Security Act, is measured against the State definition of "need" and State "payment standard" to determine initial and continuing eligibility for AFDC, and the amount of the assistance payment.

The standards for computing "available income"² are

¹See 42 U.S.C. §604 for sanctions against States not in conformity.

²The term "available income" denotes regularly received monies which the Act requires to be expended so as to reduce the "need" for AFDC, i.e. it reduces dollar for dollar the AFDC payment that would otherwise be made. Not all income is "available". The Act, judicial interpretations thereof, and regulations promulgated by the Department of Health Education and Welfare in administering the AFDC program, classify certain income as "unavailable," e.g. gross earn-

set forth in Section 402 (a) (7) of the Act; 42 U.S.C. §602 (a) (7); the so-called "income and resources clause," which states in relevant part:

42 U.S.C. §602

- (a) a state plan for aid and services to needy families with children must
- (7) except as may be otherwise provided in clause (8), the agency shall in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children.....
(Emphasis added)

Section 402 (a) (8) of the Act; 42 U.S.C. §602 (a) (8) (referred to as "clause (8)" in §602 (a) (7) supra, provides in relevant part:

§602 (a) A state plan for aid to needy families with children must

- (8) provide that, in making the determination under clause (7) the State agency --

(A) shall with respect to any month disregard--

- (i) all of the earned income of each dependent child receiving aid to families with dependent children who is (as determined by the State in accordance with standards pre-

ings necessarily expended in work, (taxes, work expenses, F.I.C.A., and union dues) are not available income. See 42 U.S.C. §602 (a) (7) 45 C.F.R. §233.20 (a) (3) (iv) (a), and Shea v. Vialpando, 416 U.S. 251 (1974).

scribed by the Secretary) a full time student or part-time student who is not a full-time employee attending a school, college, or university, or a course of vocational or technical training designed to fit him for gainful employment, and

(ii) in the case of earned income of a dependent child not included under clause (i) a relative receiving such aid and any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first \$30 of the total of such earned income for such month plus one-third of the remainder of such income for such month (except that the provisions of this clause (ii) shall not apply to earned income derived from participation on a project maintained under the programs established by section 632 (b) (2) and (3) of this title);
(Emphasis supplied)

These provisions of §602 (a) (8) are the so-called "earned income disregards" enacted by Congress in 1967 to provide a monetary incentive for AFDC recipients to find and retain gainful employment. The earnings disregard provided for in §602 (a) (8) (A) (ii) is the so-called "\$30 and 1/3" earned income disregard, and is hereinafter referred to as such.

In §§602 (a) (7) & (8) Congress has mandated that the amounts of earned income statutorily disregarded do not reduce the "need" for AFDC nor the amount of assistance to be paid in accordance with state standards.³

³See 45 CFR §§233.20(a) (7) and 233.20(a) (3) (ii) (a). See also discussion at page 30 , infra.

Title 18 NYCRR §352.31(d)(1)(ii), the regulation challenged in this lawsuit, governs recoupment of AFDC overpayments made to recipients and not occasioned by any willful act on their part. It states in relevant part:

(d) Recoupment of overpayment. (1)

(1) Except as provided in paragraph (2) of this subdivision, recoupment of overpayments of assistance including overpayments resulting from assistance paid pending a hearing decision shall be treated as follows:

(ii) Recoupment of any overpayment made to a recipient shall not be required unless the recipient has currently available income or resources, exclusive of the current assistance payment. Exempted income and disregards shall be considered as being currently available.

(Emphasis supplied)

This regulation authorizes the withholding of "earned income disregards" to recoup overpayments made through the agency's administrative error and nonwillful recipient error. Recoupment is accomplished by reducing the semi-monthly assistance payment by an amount equal to all or part of the income which must be disregarded in computing that payment. Such reductions continue until the overpayment is completely recouped.

The Named Plaintiff

JOSEPHINE MCGRAW and her nine minor dependent children reside together in New York County.

Ms. McGraw has been employed as a "cooks helper" at

Saint Matthew - Saint Timothy Day Care Center for the past three years. During this period and prior to the time she began work, Ms. McGraw and her nine children received AFDC in a grant administered by the New York City Department of Social Services. ("The City Agency ") (Ver. Compl. ¶ 6,7, R-38).

The City Agency "disregards" the first \$30 and one-third of the remainder of Ms. McGraw's gross monthly earnings, in determining the amount of income to apply against New York's AFDC payment standard for a family of ten. This "30 and 1/3 disregard" is mandated by 42 U.S.C. 602 (a) (8), for families who like the McGraws, secured gainful employment while receiving AFDC.

On April 29, 1975 the City Agency advised the McGraw family that:

Your S/M [semi-monthly] income from the period July, 1974 to present should have been \$127.59, not \$80.43 as previously budgeted. This resulted in \$990.36 in overpayment for this period.

Regulations permit recoupment on amounts up to the total exempted income. Since your budget deficit is less than your exempted income your case will be suspended for 13 issue(s) until this amount is recouped.
(Emphasis added)

(Ex. "A" Plaintiff's Aff., R-31, Decision p. 7, R-7).

Thus, the "City Agency" having ascertained that it had understated the amount of Ms. McGraw's income for 10 months, and had in consequence overpaid her family, intended to recoup

the overpayment. Referring to 18 NYCRR §352.31(d)(1)(ii), the agency informed plaintiff that State regulations treated her earned income disregard (referred to therein as "exempted income") as available for recoupment. (Ver. Compl. ¶ 24, R-44).

On May 14, 1975 Ms. McGraw requested that the New York State Department of Social Services ("the State Agency") hold a "fair hearing" to review the City Agency's proposed recoupment measures. A hearing was held on June 3, 1975, and on August 6, 1975, defendant Berger announced the following determinations:

1) The McGraws had received, through "administrative error" of the City Agency, an AFDC overpayment

2) That overpayment could be recouped in accordance with State law only if the McGraws had available income and/or resources in excess of their AFDC grant.

3) The McGraws "\$30 and 1/3 earned income disregard" represented such excess income and thus was subject to recoupment under 18 NYCRR §352.31(d)(1)(ii). (Ex. "B" Plf's. Aff. R-32, Decision p. 7, R-7).

Pursuant to that decision, the City Agency proceeded to reduce the McGraws' semi-monthly AFDC payment by "withholding" a portion of the earned income disregards. The agency's departure from its initial intention to completely suspend its payments to the McGraws' has to this date remained unexplained by the City Agency. (Decision.p. 8, R-8).

Ms. McGraw, neither at the time of the City Agency's original decision to recoup, nor at the time of the fair hearing, had any income other than her earnings and her family's supplementary AFDC grant.⁴ (Plf's. Aff. ¶ 10, R-29)

Therefore, recoupment is effected solely by reduction of the assistance payment. The amount withheld from the payment, in turn, represents a portion of the earned income disregard which the challenged regulation treats as income "in excess of" the AFDC payment. Thus, the AFDC payment computed in accordance with the requirements of the Social Security Act is reduced by employing the regulatory fiction that in reducing the assistance payment the Agency is thereby withholding money which is "exclusive of" and "in excess of" that payment. (Ver. Compl. ¶ , R-46).

⁴The McGraw family had unwittingly expended the overpayments by the time the City Agency discovered its error. (R-29)

The AFDC payment standard for a family of 10 like the McGraws is \$1.86 per day per person plus shelter costs. The overpayment provided each member of the McGraw family with a daily windfall of 31¢. These meager sums are characteristic of AFDC overpayments. When, as in the instant case, the overpayments are caused by administrative error or non-willful recipient error, they are expended without the recipient noticing.

POINT I

THE COURT BELOW ERRED IN
FINDING THAT RECOUPMENT
OF NON-FRAUDULENT AFDC
OVERPAYMENTS FROM EARNINGS
DISREGARDED PURSUANT TO
42 USC §602 (A) (8) IS
CONSISTENT WITH THE SOCIAL
SECURITY ACT

Plaintiff challenges defendants' actions, authorized by 18 NYCRR §352.31(d)(1)(ii), in recouping an agency caused AFDC overpayment from the portion of her earnings statutorily disregarded in accordance with 42 USC §602(a)(8). Recoupment is effected by reduction of the AFDC payment, previously computed utilizing the mandatory disregard procedure, and presuming that the "disregarded" income will make up the deficit. The statutory command of 42 USC §602(a)(8) to "disregard" the specified portion of earnings in determining the "need" for AFDC and the amount of the assistance payment is violated by overpayment recoupment actions effected pursuant to the challenged regulation, when the overpayment was caused by to agency error or the non-wilfull error of the recipient. Judge Conner held that the mandate to disregard the first \$30 and 1/3 of the remainder Ms. McGraw's gross monthly earnings was not offended when defendants applied the "disregard" in their computation of the family's "need" for AFDC, and thereafter proceeded against the "disregarded" work incentive income by reducing the family's AFDC payment.

Plaintiff will demonstrate that recoupment of non-fraudulent AFDC overpayments from earnings disregarded

pursuant to 42 USC §602 (a) (8), violates the Social Security Act. It will be shown that the lower Court's interpretation of the statute is incorrect, and that the Court's reasoning was misdirected by several outright factual errors.

A.

The Challenged New York
Regulation Violates 42 USC
§§602 (a) (7) and 602 (a) (8)

The "income and resources clause" of the AFDC title, 42 USC §602 (a) (7), and the "earnings disregard clause", 42 USC §602 (a) (8), both require that the earnings specified in §602 (a) (8) shall be "disregarded" in determining "need", i.e., financial eligibility, for AFDC. 45 CFR §§233.20(a) (7) and 233.20(a) (3) (ii) (a) make clear that the earnings specified in §602 (a) (8) must also be "disregarded" in determining the AFDC assistance payment.⁵

Disregarded income neither reduces the recipient's "need" for AFDC nor the amount of the assistance payment, whether payment is made at the level of "need" or some lower figure.⁶ States differ in their legislated "standards of

⁵ See extended discussion at page 30 , infra.

⁶ New York at present provides AFDC recipients with 100% of its "statewide standard of need". The statewide levels of assistance and standard of need are identical. See New York Social Services Law §§131-a(2) & (3). Thus, the deficit between "available income" and the "statewide standard of need" must be fully met. During the period 1970-1973 AFDC recipients received only 90% of computed "need" under these standards. The individual states' power to legally control AFDC outlays reside in their power to legislatively set the statewide standard of need and provide less than 100% of computed "need" in the payment level. See Rosado v. Wyman, 397 U.S. 397 (1970), Dandridge v. Williams, 397 U.S. 471 (1970), and Jefferson v. Hackney, 406 U.S. 535 (1972).

need" and in their policies of paying full "need" or some fraction thereof, but in all states the statute requires that families of working AFDC recipients have exactly "\$30 and 1/3" of their monthly earnings more than otherwise identically situated non-working families.

In the case of N.W.R.O. v. Weinberger, 377 F.Supp 861 (D.D.C. 1974), the Court invalidated the HEW recoupment regulation which permitted States to recoup non-fraudulent AFDC overpayments, by reduction of the assistance payment, when a family had no "currently available" income or resources other than the assistance payment. The Court held that such recoupment, which reduced a family's income below the State's AFDC payment standards, violated Title IV-A of the Act, by depriving needy dependent children of the level of income that the State had determined to provide for their maintenance. HEW amended its regulation to prohibit recoupment of non-fraudulent AFDC overpayments, unless the recipient had at the time of proposed recoupment "available" income or resources "exclusive of the current assistance payment."⁷ 45 CFR §233.20(a)(12)(i)(A)(1). The challenged regulation, 18 NYCRR §352.31(d)(1)(ii), treats "disregarded" earnings as "currently available income" "exclusive of the current assis-

⁷ HEW's regulation and the position of that agency with respect to the challenged practice is discussed at pages 33-42 , infra.

tance payment, and thus recoupable. Recoupment is effected by reduction of the assistance payment previously computed utilizing the disregard. This violates the Act in two ways.

First, the regulation defines the "disregarded" earnings as excess income which will replace that part of the assistance payment withheld through recoupment, while the Act requires that the specified proportion of earnings be "disregarded" in computing that same assistance payment. The regulation seeks to achieve by semantic indirection what is directly prohibited. The regulation's characterization of disregarded earnings as "exclusive of" the assistance payment, is irrational when the disregarded procedure is a mandatory step in computing and paying the assistance payment.

Second, the regulation authorizes recoupment reducing the disposable income of working AFDC recipients, who receive non-fraudulent overpayments, to the level of non-working recipients receiving such overpayments. However, it was the intent of Congress to provide all working beneficiaries of the §602 (a) (8) disregards with additional income of precisely "\$30 and 1/3" of their earnings.

1. The Legislative History And
Judicial Interpretation of
§602 (a) (8) Reveal That Congress
Mandated The Disregard Of
Specified Earnings, As A Work
Incentive, Whenever An Assistance
Payment Is Made

The legislative history of §602 (a) (8) evidences the focus of Congressional concern in enacting the earned income

disregards and their mandatory nature. The report of the Senate Finance Committee accompanying H.R. 12080, which as revised in conference was enacted as P.L. 90-248 (The Social Security Amendments of 1967), which created the income disregards stated:

Like the Committee on Ways and Means of the House, this Committee has become concerned about the continued growth in the number of families receiving aid to families with dependent children (AFDC). In the last 10 years, the program has grown from 646,000 families that included 2.4 million recipients to 1.2 million families and nearly 5 million recipients....

We are deeply concerned that such a large number of families have not achieved and maintained independence and self-support, and are very greatly concerned over the rapidly increasing costs to the taxpayers. Moreover, we are aware that the growth in this program has received increasingly critical public attention....

The committee is recommending the enactment of a series of amendments to carry out its intent of reducing the AFDC rolls by restoring more families to employment and self-reliance.

The first series of amendments is designed to encourage and make possible the employment of adults in AFDC families. Three provisions are aimed at this purpose....

(3) A requirement that all States exempt part of the AFDC recipients' earnings to provide incentives for work in regular employment.

(Emphasis supplied)

Senate Report No. 744, 90th
Congress 1st Sess. (1967),
1967 U.S. Code Cong. and Admin.
News 2981-2982.

Later in the report the Committee re-emphasized the nature and purpose of the "income disregards, stating:

If all the earnings of a needy person are deducted from his assistance payment, he has no gain for his effort. Currently, there is no provision in the Social Security Act under which States may permit an employed parent or other relative under the AFDC program to retain some of his earnings. There is no doubt, in the opinion of the committee, that the number of recipients who seek and obtain employment will be greatly increased if in conjunction with the work incentive program, there may be added to title IV some specific earnings incentives for adults to work. The Department of Health, Education, and Welfare has informed the committee that research and demonstration projects have illustrated that more recipients will go to work when an incentive exists.... The exemption provided by the Committee on Ways and Means would require that the States disregard the first \$30 a month and one-third of all additional earnings made by adults in the family. Id. at 2994-2995.
(Emphasis supplied)

Congress enacted the earnings disregard as the central provision in a comprehensive set of amendments aimed at encouraging employment as an alternative to total reliance on AFDC. When the income disregard clause was added to the Act numerous provisions were simultaneously added to other sections, with the avowed goal of encouraging and facilitating

employment.⁸

Despite the mandatory wording of §602 (a) (8) and the clear legislative intent, certain states failed to disregard earned income as prescribed in the Act or adopted various administrative procedures which departed from the specific statutory formula. The Supreme Court foreclosed any further dispute about the specific mandatory nature of §602 (a) (8) in Engelman v. Amos, 404 U.S. 23, (1971) a unanimous per curiam opinion affirming the three judge court decision in Mr. X v. McCorkle, 333 F.Supp. 1109 (D.N.J. 1970). The decision demonstrated the Court's resolve to strike down state practices which circuitously violate §602 (a) (8) while proclaiming compliance with its mandate, as New York has in the case at bar. In Mr. X, the three-judge court enjoined and invalidated New Jersey's "administrative income ceiling", applied to recipients and applicants with sources of income other than AFDC. The "administrative income ceiling" limited the income of working recipients, including AFDC, to an amount set approximately one-third (1/3) above New Jersey's "need standard." Total income was computed without application of the disregard. New Jersey's defense of its regulation was based on setting the "administrative ceiling" above the "standard of need." The working recipient's family retained some portion of her earnings and was better off financially than non-working families, though not "\$30 and 1/3" better

⁸ See 42 USC §§602 (a) (14), 606 (d), and 625.

off. New Jersey contended that this work incentive fulfilled the mandate of §602 (a) (8). The Court stated:

The legislative history reveals the general purpose of section 402 (a) (8), [42 U.S.C. §602 (a) (8)] and the language of the section is quite specific. It demonstrates an amount, \$30, and a proportion, one-third of the individual's earned income, which must be disregarded before determining need.

If Congress were willing to allow States to devise methods of encouraging employment by developing their own formulae, the statute could have been so written. As it exists today, however, it is a particular directive mandating that states follow a specified formula. No other scheme would comply with the statute..... New Jersey's decision to allow persons to get one third above "need" as defined by New Jersey, is not the equivalent of thirty dollars plus one third of an individual's earned income. The New Jersey formula may be more advantageous to others. Nevertheless, the statute requires adherence to the formula it sets forth. The use of the one third formula in the federal statute relates the amount of the "disregard" to the earnings of the individual. The more he earns the more he keeps. This is not so under the New Jersey regulation. (333 F.Supp. at 1117).

The above cited decisions and committee reports and the plain meaning of §602 (a) (8) clearly demonstrate that the purpose of §602 (a) (8) was to encourage AFDC recipients to work, by mandating that they retain a specified portion of their earnings. When Ms. McGraw and members of the purported

class are subjected to recoupment of their earnings disregard, the result is no different than if New York had failed to apply the disregard procedure in the computation of their assistance payments. Either procedure reduces their disposable income to the level provided to similarly situated non-working recipients, whose assistance payments may not be reduced to recoup non-fraudulent overpayments. N.W.R.O. v. Weinberger, supra. Moreover, the Supreme Court's decision in Engelman v. Amos, supra. precludes the State from failing to apply the disregard procedure. The State has merely altered the sequence, withholding the benefit of the disregard after, rather than before, the mathematical computation of the payment, but prior to making the payment. The result achieved is identical in its economic impact on the family, its diminution of the incentive to remain employed, and its illegality.

2. The Court Below Erred In Finding That A Temporary Suspension And Diminution Of The Work Incentive Did Not Thwart Congressional Intent In Enacting The Earnings Disregard

The Court below stated:

Certainly as it is applied in the present case, in which the recoupment cancels or reduces the effect of the disregard for only a limited period, there is no destruction of the work incentive, but only a temporary diminution or suspension thereof, and thus no thwarting of congressional intent. (R-17)

The Court's balancing approach evidences a basic misunderstanding of the appropriate inquiry, i.e., does the mandate of §602 (a) (8) to "disregard" specified earnings in making the assistance payment preclude the challenged assistance payment reductions? If so, the Supreme Court's decision in Engelman v. Amos, supra would dismiss reliance on anything other than the full and uninterrupted disregard as complying with Congressional intent. That case held that §602 (a) (8) required strict adherence to the specific "\$30 and 1/3" formula when paying assistance and making the determination of "need."

As a practical matter, moreover, the lower Court's cavalier characterization of the "suspension or diminution" of the work incentive as merely "temporary"⁹ simply fails to come to grips with the actual impact on the family's economic wellbeing and on their incentive to remain working. The facts of Ms. McGraw's case bear this out.¹⁰ The City Agency originally proposed to suspend the McGraw family's entire assistance payment for 6 1/2 months. Thereafter, without explanation, the Agency proceeded instead to reduce the assistance payment by \$24.00 semi-monthly. (Decision p. 8, R-8). At that rate the diminution of the work incentive would continue for 21 months. The tendency to reduce work

⁹ Decision p. 17, R-17.

¹⁰ Ms. McGraw's affidavit describes the ways in which her family was harmed prior to issuance of the restraining order. (Plf. Aff. ¶ 15, R-30).

effort, when faced with diminished or completely nullified financial gain, cannot simply be dismissed because it may last only a year, or as with Ms. McGraw, more nearly two. The \$48.00 monthly reduction in the McGraw family's assistance is the equivalent of New York's statewide "need" standard for one of Ms. McGraw's children for nearly a month. The legislature has determined that \$50.00 is necessary to provide for food, clothing, utilities, transportation, school supplies, and all other basic needs of children, save shelter, which is provided for separately. 18 NYCRR §352.1 To merely recite that disregarded income is by definition money exceeding the "need" standard, is to completely ignore the meager sums provided to recipients and their absolute reliance on every penny of their retained earnings. It is also to ignore the fact that Congress mandated that working families have this extra income as an incentive to remain employed.

3. The Court In Johnson v. Likins
Correctly Interpreted The
Statutory Mandate of §602 (a) (8)

To date there is only one Federal decision on point: Johnson v. Likins, No. 4-75-Civ.-318 (D. Minn. 10/10/75). (R-54-100). In Johnson, the district court enjoined enforcement of a Minnesota AFDC regulation which authorized recoupment of agency caused overpayments from only one-half (1/2) of the §602 (a) (8) income disregards.¹¹ The Johnson Court

¹¹ The Johnson Court did not decide whether recoupment of non-willful recipient caused overpayments from disregarded earnings violates §602 (a) (8). The HEW and New York regulations draw the line of distinction between fraudulent and non-fraudu-

reviewed the language of §602 (a) (8) requiring the specified earnings to be disregarded when the State determines "need", and observed that the recoupment of disregarded earnings violates the spirit of the statute when premised

on the States determination that the disregarded funds are not "needed" by the recipient. (Johnson decision p. 27-29, R-80-82).

Reviewing the legislative history of §602 (a) (8), Congress' contemporaneous enactment of other work related provisions, and the mandatory language of the section, the Court concluded that "Congress intended that the disregard income be disregarded whenever an AFDC payment is made" (Johnson decision p. 29, R-82).

The Johnson Court was unaware of HEW's actual position, which permits recoupment from disregarded income. The Court interpreted HEW's ambiguous recoupment regulation, and other HEW regulations, treating the disregard as "unavailable", as precluding recoupment. However, the Court did not rely on this mistaken assumption. The Court invited HEW to file a brief amicus curiae, which it has done. The Johnson Court's reasoning shows that it would have rejected HEW's interpretation, because it is the same interpretation proffered by Minnesota and rejected by the Court.

Both the defendants in Johnson and in the instant case lent overpayments, i.e., non-willful recipient caused and agency caused overpayments are treated identically for recoupment purposes.

argue that the disregard provides income in excess of "need", and is thus available for recoupment. Indeed, the Court below relied heavily on the fact that application of the challenged New York regulation still leaves recipients with disposable income at least equal to the state's "need standard." (Decision p. 8, ¶ 3 and p. 17, ¶ 1, R-8 and R-17). That New York, in effecting the challenged recoupment, does not invade the "standard of need" is legally irrelevant. The lower Court's emphasis of this factor reveals a basic misunderstanding of the central purpose of the disregard, that is, to provide working recipients with more income than non-working recipients. Congress specifically mandated that they have exactly "\$30 and 1/3" of their earnings more. Engelman v. Amos, supra. In New York the statute requires that the recipient have "\$30 and 1/3" more than the "need" standard because New York pays assistance equal to 100% of "need." In other states paying less than their "standard of need" §602 (a) (8) requires that the recipient have "\$30 and 1/3" more than the relevant assistance payment standard. The Johnson Court understood this, and struck down the Minnesota recoupment scheme which recouped from only one-half of the disregarded earnings, leaving the recipient with income equal to the "standard of need" plus one-half of "\$30 and 1/3." (Johnson decision p. 32, R-85).

The Johnson Court noted that the mandate of §602 (a) (8) is the same in all states. If it does not prevent recoupment

of the disregard in Minnesota, which, like New York, pays 100% of "need," it would not prevent the practice in states paying less than need. (Johnson decision p. 35, R-88). This would reduce the income of working recipients in these states to a sub-need level. The Court below took issue with the Johnson Court stating:

The Johnson Court's reluctance to sanction recoupment from disregards was in no small measure derived from the assumption that [Quoting from Johnson] "If Minnesota [which provides grants in full satisfaction of recipients needs] is free to recoup from disregard income in these circumstances, so is a State paying less than need. In such a State disregard income may be the only resource which allows an A.F.D.C. family to rise to the level of minimum subsistence and recoupment from 'excess' income might be recoupment from the mouths of hungry children." [End Johnson quote] Johnson v. Likins, supra, at 36

"Neither that reluctance nor that assumption, however, was warranted in the light of the ruling in National Welfare Rights Organization v. Weinberger, supra. and H.E.W. regulations subsequent conformity therewith. See pp. 10-11, supra...."

The Court below is simply wrong. The current H.E.W. regulation permits the entire amount of disregarded income to be recouped, regardless of whether a given State pays full "need" or some fraction thereof.¹² In the 34 States¹³ paying less

¹² HEW's regulation and that agency's position on the challenged practice are discussed at pages 33-42, infra.

¹³ 34 states, including Puerto Rico, pay less than their "need's standard." Oklahoma and Washington pay "need"

than their "need standard" disregarded income provides families of working recipients with "\$30 and 1/3" of their earnings more than the less than subsistence payment standard. Recoupment of disregarded income permits these States to plunge working families back to the relevant "sub-need" payment standard. The lower Court's reading of N.W.R.O. v. Weinberger, supra. as preventing a reduction of the payment below "need" is a mistake. N.W.R.O. shielded the "current assistance payment" from overpayment recoupment, when there is no other "currently available" income or resources, whether that payment is made at the "need" level, or as in 34 States, at a payment standard which is less than "need." In the instant case, issue is joined on whether disregarded income is "currently available."

Congress was aware, when it enacted §602 (a) (8), that disregarded earnings would meet basic needs in many States paying less than "need."¹⁴ This was an additional reason,

for smaller families and less than "need" for larger families. Characteristics of State Plans for AFDC under Title IV-A, HEW, S.R.S., A.P.A., p. 232-233 (1976).

¹⁴ The debates on the 1967 amendments to Title IV-A evidence Congressional awareness of the practice in many states of paying assistance at less than "need standards." When Congress enacted §602 (a) (8) it rejected proposed §602 (a) (14) (A) which would have required the States to pay their "standards of need" See Hearings before House Committee on Ways and Means on H.R. 5710, 90th Cong. 1st Sess. Pt. 1, p. 216 (1967); Hearings before the Senate Committee on Finance on H.R. 12080, 90th Cong. 1st Sess., Pt. 1, p. 216 (1967). See also Rosado v. Wyman, 397 U.S. 397 (1970) at 409-415, notes 12, 15.

along with the primary goal of work incentives, for Congress to make the disregard absolutely mandatory and interweave it with "need" and payment. This factor, misunderstood by the Court below, should have been weighed in assessing whether the statutory mandate prohibits recoupment of the disregard.

Both the Court below and the Johnson Court, have dismissed reliance on Bradford v. Juras, 331 F.Supp. 167 (D. Ore. 1971). The Bradford Court held that Oregon could recoup overpayments caused by recipient fraud (not at issue in the instant case) from §602 (a) (8) income, because it determined the disregard provisions were not mandatory. The Supreme Court's affirmance of Mr. X v. McCorkle, supra. in Engelman v. Amos, supra. discredited the basis for the Bradford Court's reasoning. (Decision p. a, R-19; Johnson decision p. 26, R-79). Plaintiff would assign greater weight to Bradford than either Court, because the language of that decision reveals that the Court would have ruled that §602 (a) (8) disregarded earnings could not be recouped had it understood that the disregard provisions were mandatory. The Bradford Court stated:

Since a state may, in the exercise of its discretion, eliminate both the cash reserve and the income disregard, it may, as a temporary expedient look to these assets in recovering client-caused overpayments.
331 F.Supp. at 169

4. The Court Below Erred In Finding That The State Must Apply The Disregard In The "Need" Determination, But May Thereafter Withhold The Disregard By Reduction Of The Assistance Payment

The Court below assigned great weight to defendants' contention that their obligation under the statute could be discharged by performing the accounting procedure of disregarding the "\$30 and 1/3" in determining "need" and thereafter withholding the disregard by ultimate reduction of the assistance payment. The Court stated:

Analyzed in the abstract, defendants' argument that recoupment of overpayments from earned income disregards does not offend the literal import of Section 402 (a) (8) exerts a considerable force. Thus, defendants assert, the statutory disregard extends -- in terms -- no farther than the bounds of a State's "determination of need," a determination that, according to defendants, involves no more than an identification of those who are eligible for AFDC benefits and a calculation of the AFDC family's budget deficit.... Thus, defendants reason, in its recoupment of overpayments, the welfare agency does not "determine need" when it proceeds indirectly against the already-honored disregard by adjustment of the ultimate AFDC payment. (Decision p. 10, R-10)

The decisions and legislative history, cited above, belie this conclusion that the "disregard" may be withheld by treating it as merely an accounting procedure separated from the ultimate payment of assistance. Nevertheless, the Court

below reached this conclusion and it is clear that its underlying reasoning was contaminated by a fundamental factual error, repeated in various formulations throughout the decision. The Court erroneously assumes that the earnings disregard procedure is mandatory only in the determination of "need," and not in the actual payment of assistance. In dismissing the reasoning of Johnson v. Likins, supra, the Court states:

However, I believe that the Johnson Court read into section 402 (a) (8) more than Congress said or intended. Johnson's reading of the statute as saying that "\$30 and 1/3" of earnings "shall be disregarded in determining the amount of the assistance payment" id. at 29 (emphasis added), goes too far. That section instead states only that this portion of the earned income should be disregarded in determining the applicants need which, as we have seen, may be equal to or greater than the assistance payment.

The relevant HEW regulations clearly reveal the mistake of the Court below. 45 CFR §233.20(a)(7) states in relevant part:

§233.20 Need and Amount of Assistance
(a) Requirements for State Plans.
A State plan for ... AFDC ... must as specified below:
(7) Disregard of earned income:
Method (i) Provide that the following method will be used for disregarding earned income: The applicable amounts of earned income to be disregarded will be deducted from the gross amount of "earned income," and all work expenses, personal and non-personal, will then be deducted. Only the net

amount remaining will be applied in determining need and the amount of the assistance payment.

(Emphasis added)

45 CFR §233.20(a)(3)(ii)(a) states in relevant part:

§233.20 Need and amount of assistance.

(a) Requirements for State Plans. A State Plan for ... AFDC, ... must, as specified below

(3)(ii) Provide that in establishing financial eligibility and the amount of the assistance payment:

(a) All income and resources, after policies governing the allowable reserve, disregard or setting aside of income and resources have been applied, will be considered in relation to the State's standard of assistance and will first be applied to maintenance costs.

(Emphasis added)

These two regulations implement 42 USC §§602(a)(7) and 602(a)(8), the "income and resources" and the "earnings disregard" clauses of the AFDC title. The lower Court repeatedly errs in stating that the disregard is mandatory in the determination of "need" but not in the payment determination, and this error misdirects the Court's reasoning on the scope of §602(a)(8)'s mandate. (Decision p. 9, ¶ 2, R-9; p. 10 ¶1, R-10; p. 14 ¶ 1, R-14) While Congress has acquiesced in many States paying less than their "need standard", it has required uniformity in application of the disregard in the payment determination, so that all working recipients have "\$30 and 1/3" ^{than} more disposable income/otherwise identically situated non-working recipients. This fact is noted at footnote 5 of the Supreme Court's decision in Jefferson v. Hackney, supra. which

upheld Texas' .75 percentage reduction factor. 406 U.S. at 539.

The Court below directed its attention to defendants' application of the "disregard" in the mathematical computation of "need", fully missing the intent of Congress in tying the "disregard" to "need." Section 602 (a) (7) explicitly provides that income disregarded pursuant to §602 (a) (8) does not reduce "need." The State may not call on disregarded earnings to meet "need" left unsatisfied by its reduction of the assistance payment. The "need" definition is a legislated entity and must be treated in a consistent manner.

The State may not premise the reduction of the assistance payment on the possession of §602 (a) (8) earnings, which, by definition, shall not reduce the assistance payment. A recent New York case makes this point in holding that the State could not require a recipient to expend disregarded earnings for needs that would ordinarily be met by the assistance payment. In Williams v. Lavine, 77 Misc.2d 556, 353 NYS2d 340 (Sup. Ct. Nassau 1974), the Court was asked to determine whether a working recipient could be required to spend the earnings disregard to pay for rent exceeding the State's "need standard", but whose cost had been approved by the agency, and would ordinarily be paid by increasing the assistance payment. The Court stated:

"The State upheld the rental denial here on the ground that Mrs. Williams had available child care income to meet the added

shelter need.

Mrs. Williams' income is not all "available" to be applied against her family's prescribed needs. As an employed recipient of supplemental AFDC assistance, she is permitted to disregard some income received, and must count only the balance toward her family's needs.... The obvious purpose of the exclusion is to encourage those receiving AFDC assistance to become employed, and, in so doing, to lessen the amount of governmental assistance required to provide for basic family needs. This is accomplished by permitting the employed person to disregard some of the income earned so that she is "better off" than she would be if receiving the full assistance grant, without working. It is a legislated reward for those individuals who alone assume the double burden of caring for children and a home and working to support both.

This especially excluded income is not to be applied towards needs that would otherwise be met by a public assistance grant, including a discretionary allowance for rent."

(Emphasis added) 353 NYS2d at 344, 345

The recoupment of disregarded earnings under 18 NYCRR §352.31(d)(1)(ii) violates the mandate of §602(a)(8) to disregard specified earnings whenever assistance is paid or "need" determined.

B.

HEW's Recoupment Regulation,
Permitting The Challenged
Practice, Is Invalid

HEW is not a party to this action. However, HEW shares with the Courts the responsibility for securing State

compliance with provisions of the AFDC title of the Social Security Act, and has taken the position that overpayment recoupment from disregarded earnings is permissible.

The challenged New York regulation was promulgated after HEW promulgated its current recoupment regulation. The New York regulation substantially adopts the language of the HEW regulation. Each authorizes recoupment of non-fraudulent AFDC overpayments when the recipient has "currently available" income "exclusive of the current assistance payment." The New York regulation explicitly defines §602 (a) (8) "disregarded" earnings as "currently available" and "exclusive of the current assistance payment." The HEW regulation has been clarified by agency interpretation to define §602 (a) (8) disregarded earnings as being subject to recoupment under the regulation. (HEW letter to States, Ex. "B" Plf's. Supp. Memo of Law, R-101-102, see also R-148). The HEW regulation is invalid for the same reasons that the challenged New York regulation is invalid. Plaintiff will not recapitulate arguments set forth above. Those arguments are applicable to both regulations.

1. HEW's Current Recoupment Regulation

The current HEW regulation, governing the challenged practice, is 45 CFR §233.20(a)(12)(i)(A)(1). The regulation was issued after the invalidation of HEW's previous recoupment regulation. N.W.R.O. v. Weinberger, supra. 45 CFR §233.20(a)(12)(i)(A)(1) states:

(12) Recoupment of overpayments and correction of underpayments. Specify uniform Statewide policies for:

(A) The State may not recoup any overpayment previously made to a recipient:

(1) Unless the recipient has income or resources exclusive of the current assistance payment currently available in the amount by which the agency proposes to reduce payments;

HEW has taken the position that §602 (a) (8) disregarded earnings are "currently available" and "exclusive of the current assistance payment." (R-101-102, 148). HEW's regulation is so ambiguous that the defendants, in seeking to invoke HEW's support in the proceedings below, cited 45 CFR §233.20(a) (12) (i) (f) as the governing regulation. (Defendants' Memo of Law, p. 14-15, R-163-164). The Court below was also unable to determine the actual source of HEW's support, stating at page 11 of the opinion:

Defendants construction of section 402 (a) (8) is reinforced by the apparent support of H.E.W., the federal agency charged by the statute with execution of the Social Security Act. To be sure that support is not clearly reflected on the face of H.E.W.'s implementing regulations. Thus, the most pertinent of those regulations provides no more than that....:
(Emphasis added)

The Court then cites the wrong regulation, 45 CFR §233.20(a) (12) (i) (f) which states in relevant part:

(f) Any recoupment of overpayments permitted by paragraph (a) (12) (i) (A) (2) of this section may be made

from available income and resources (including disregarded, set-aside or reserved items) or from current assistance payment or from both. If recoupments are made from current assistance payments, the State shall, on a case-by-case basis, limit the proportion of such payments that may be deducted in each case, so as not to cause undue hardship for recipients.

§233.20(a)(12)(f)(A)(2) referred to in subsection(f) governs recoupment in fraud cases, and does not relate to the non-fraudulent overpayments received by all members of Ms. McGraw's purported class. Neither the Court nor the parties invoking HEW support for their conclusions, were able to ascertain the actual source of this "apparent" support, despite the fact that plaintiff's cited the correct regulation and submitted copies of an HEW clarifying letter. (Plf's. Supp. Memo of Law and Ex. "B" annexed thereto, R-148, R-101-102). This is evidence of the lower Court's unreasoned deference to the federal agency and reluctance to examine plaintiff's refutation of the agency's interpretation.

HEW's policy permitting the challenged practice conflicts with other HEW regulations which properly treat the earnings disregard as "unavailable". 45 CFR §233.20(a)(3)(ii) states:

(a) Requirements for State Plans.
A State Plan. . . must. . .

* * *

(3) Income and resources. . .

* * *

(ii) Provide that, in determining need and the amount of the assistance payment, after all policies governing the reserves and allowances and disregard or setting aside of income and resources referred to in this section have been uniformly applied:

(b) in determining financial eligibility and the amount of the assistance payment, all remaining income and resources may, at the State's option, be considered in relation to the State's need standard, or the State's payment standard;

(d) net income available for current use and currently available resources shall be considered. . . .

Effective date. These regulations were effective June 17, 1975." Federal Register, Vol. 40, No. 54, March 19, 1975.

(Emphasis added)

First, "currently available" income is determined only "after all policies governing. . . . disregard . . . of income have been uniformly applied." Here the income disregard is appropriately treated as not "currently available." To reconcile H.E.W.'s recoupment regulation with the cited regulation, one must dichotomize the concept of "availability," treating the disregard as "unavailable" income for determining eligibility, need, and payment, those procedures specifically authorized in the Social Security Act, but "available" for recoupment, a procedure not authorized by the Act.¹⁵

¹⁵ See footnote 17 page 41, infra.

Second, "in determining". "the amount of the assistance payment, all remaining income and resources may" "be considered", that is, "all remaining" "after all policies governing the reserves and allowances and disregard or setting aside of income. have been uniformly applied". The assistance payment is determined after applying the disregard, but HEW's recoupment regulation allows this same assistance payment to be reduced solely because of the existence of this disregarded income.

Finally, HEW's recoupment regulation and the challenged New York regulation both define disregarded income as "exclusive of the current assistance payment". However, HEW has admitted that the disregard is not exclusive of the assistance payment. In the July 10, 1974 letter to the States, clarifying the recoupment regulation, HEW states:

In this regard, please note that subsection (A)(1) [referring to §233.20(a)(12)(i)(A)(1)] of the revised regulation is to be interpreted as though the words "exclusive of the current assistance payment" had been omitted. Thus, this provision does not authorize recoupment from net non-exempt income which has been considered in determining the welfare payment. (R-101-102)

The intent of this clarification is that, "net non-exempt income"¹⁶ is exclusive of the current assistance payment but

¹⁶ Income after the disregard and work expenses are deducted. This income reduces the AFDC payment dollar for dollar.

not "available" for recoupment, exempted disregarded income is part of the assistance grant but is "available" for recoupment purposes. The difficulty HEW has encountered in phrasing the regulation accurately reflects the impossibility of harmonizing the challenged practice with other regulations embodying requirements of the Act.

HEW's posture is that of an agency in retreat from rulings of the Federal Courts invalidating its regulations as violative of the "income and resources clause" of the Act. HEW chose to cut its losses by reading the N.W.R.O. v. Weinberger invalidation of its recoupment regulation so narrowly as to retain some practices declared illegal.

In February 1976 the District of Columbia, Court of Appeals invalidated an HEW regulation defining "currently available resources" in interpreting the "income and resources clause". The Court in N.W.R.O. v. Mathews, Secretary of H.E.W., No. 75-1741 (D.C. Cir. 2/20/76) F.2d invalidated 45 CFR §233.20(a)(3)(i) which treated resources as "currently available" according to their fair market value without regard to encumbrance. Thus, an AFDC family having \$100 equity in a \$2000 item would be charged with having \$2000 in "currently available resources." This would, in turn, result in their AFDC grant being terminated for excess resources. This recent case should provide the Court with additional evidence of the inconsistency and irrationality of HEW's interpretations of the "current availability" concept. (Decision N.W.R.O. v.

Mathews, R-119-131).

2. HEW's Proposed Recoupment Regulation

In response to the confusion caused by the wording of its current recoupment regulation, and the decision in Johnson v. Likins, supra, HEW has published a proposed regulation which clearly permits the practice challenged in this case. If enacted, the proposed regulation will be invalid, as the current regulation is, and for the same reasons.

Proposed 45 CFR §235.15 (b) (1) (ii) (A) (2) states in relevant part:

§235.15 Recoupment of overpayments; State plan requirements and options.

A State plan under title. . . IV-A. . . of the Social Security Act must specify uniform Statewide policies on recoupment of overpayments of assistance, as defined in §205.40 of this chapter.

(b) Conditions applicable to recoupment from current assistance. (1)' The State agency may recoup from current assistance payments:

(ii) On the State agency's initiative, without seeking the recipient's consent, only if:

(A) The recipient has income exclusive of current assistance and of the income that was considered in determining the amount of such assistance, (i.e. countable non-exempt income) or resources, currently available in the amount by which the agency proposes to reduce payments;. . .

(2) For purposes of paragraph (b)

(1) (ii) (A) of this section, the "income currently available" may include income set aside for

future needs of a child or for carrying out a plan or rehabilitation, and disregarded income except for income disregarded pursuant to §233.20(a)(4)(ii)(a), (d), (f) and (i) of this chapter, which are not available for recoupment under specific language of the respective statutes.

(d) Later recovery. Where recoupment under paragraph (b)(1)(ii)(A) of this section is not possible at the time the overpayment becomes known, the State agency may recoup later, when income or resources become available. (Emphasis added)
41 Fed. Reg. 8067-8068, Feb. 24, 1976

The proposed regulation exempts from recoupment "income disregarded pursuant to §233.20(a)(4)(ii)(a), (d), (f). HEW's position is that certain disregarded income (not including §602(a)(8) work incentive earnings disregards) is exempt from recoupment. These disregarded benefits are student loans under the Higher Education Act, the value of Food Stamp Bonus Coupon Allotments, the value of supplemental food assistance under the Child Nutrition Act of 1966 and National School Lunch Act, and benefits under the Nutrition Program for the Elderly of the Older Americans Act. The language of the proposed regulation, that these disregarded benefits "are not available for recoupment under specific language of the respective statutes" is simply incorrect. There is no mention of AFDC recoupment in any of these statutes. Neither is there any mention of recoupment anywhere in Title IV-A (AFDC) of the Social Security Act.¹⁷

¹⁷ The Act, by its terms, does not authorize grant reduction below computed need in any overpayment situation, irrespective of where culpability lies. In Social Security

HEW's proposed regulation contains a provision for "later recovery" of non-fraudulent overpayments. §235.15(d) supra. The proposed regulation would permit the agency to wait until a recipient becomes employed and then recoup the disregarded earnings, withholding them at the moment they would ordinarily begin to benefit the family. The recipients immediate incentive to go to work is destroyed. One may ponder whether a recipient faced with 21 months of recoupment, as is Ms. McGraw, would go to work without monetary return because almost two years hence her family might begin to benefit from her labor. This feature of HEW's proposed regulation is an indication of how seriously that agency's recoupment policy has nullified Congressional intent in enacting the §602 (a) (8), work incentive, earnings disregards. The challenged State regulation draws its authority, its language, and its spirit from HEW's recoupment policy.

Act programs where Congress has wished to authorize overpayment recovery through payment reduction it has done so specifically, as in the new Supplemental Security Income Program, 42 USC §1383(b) and the Title II OASDI programs, 42 USC §404. Furthermore these titles contain provisions for waiver of recovery when, as in the case at bar, the recipient was not at fault in receipt of the overpayment and the overpayment has already been spent unwittingly.

POINT II

THE COURT BELOW ERRED IN
REFUSING TO CERTIFY A CLASS
PURSUANT TO RULE 23(c) F.R.C.P.
AFTER IT FOUND THAT PLAINTIFF
HAD FULFILLED THE PREREQUISITES
OF RULE 23(a) (b) (2) F.R.C.P.

In denying plaintiff's motion for class certification,
the Court below stated:

As the parties were advised at
their conference with this Court,
the class action designation sought
by plaintiff would constitute, at
best, procedural surplusage. This
is not to say that the Court enter-
tains any doubt that plaintiff might
adequately represent the interests
of those welfare recipients who,
like herself, are immediately and
intimately affected by the recoup-
ment of agency overpayments from
earned income disregards. Nor does
the documentation supplied by the
parties leave any basis for question-
ing the numerosity of a class that
would consist of plaintiff and others
similarly situated with respect to
the issues presently before the Court.
(Decision p. 3-4, R-3-4).

The Court found that plaintiff had demonstrated the fulfill-
ment of all prerequisites of Rule 23(a) (b) (2) F.R.C.P., but
declined to certify the class. The Court cited no authority
for its action. In this vacuum, plaintiff can only speculate
that the Court may have been relying on the doctrine of Galvan
v. Levine, 490 F.2d 1255, 1261 (2nd Cir. 1973). In Galvan
this Court held that class certification was unnecessary
when:

"The State has made clear
that it understands the

judgment to bind it with respect to all claimants; indeed even before entry of the judgment, it withdrew the challenged policy even more fully than the Court ultimately directed and stated it did not intend to reinstate the policy." 490 F.2d at 1261. (Emphasis added)

Because of these very special facts, Galvan is inapposite to this case. The District Court in Galvan would have been justified in dismissing the action as moot, had the issues been limited to those in which the defendant had voluntarily and completely capitulated.¹⁸ Given the total withdrawal of the challenged policy prior to judgment in Galvan, it is both reasonable and likely that the District Court could not conclude at the time it entered judgment that

"The party opposing the class has acted or refused to act on grounds generally applicable to the class. . . ." (Emphasis added) F.R.C.P. Rule 23(B)(2),

for indeed when the District Court decided the class motion, this prerequisite could not be met.¹⁹

¹⁸ The Galvan District Court refused to order retroactive monetary relief. This formed the real basis of the appeal. See 490 F.2d at 1261-1262.

¹⁹ The Court of Appeals pointed out that the District Court had not stated its reasons for denying the motion for class certification. Given the factual context, it is reasonable to assume that the Court was merely exercising the traditional discretion of a District Court in determining that the prerequisites of Rule 23 were not satisfied rather than to conclude that the lower Federal Court would embark on a new and novel standard for class certification, i.e., that in addition to fulfilling Rule 23(a)(b)(2) a specific need for class certification must be shown, without even stating its reasons.

On the facts of this case, defendants would have to withdraw the challenged regulation, cease any current recoupment actions under it, and formally renounce any intention of re-enacting or substituting a similar regulation. Only then might the Galvan doctrine even arguably apply.

Recognizing the factual context of Galvan, the Courts of this Circuit have since certified numerous classes in cases legally indistinguishable from the case at bar, where declaratory and injunctive relief was sought against governmental application of allegedly unconstitutional or illegal administrative practices and authorities. In Percy v. Brennan, 384 F.Supp. 800 (S.D.N.Y. 1974), the Court noted the special facts of Galvan and explicitly distinguished that case in language directly apposite to the instant case.

"The Federal defendants argue however that although plaintiffs may have met the applicable Standards of Rule 23, their pleadings do not establish a need for class action. . . . We know of no rule which requires the demonstration of such a need in a 23(b)(2) case, the predicate of which is that 'the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.'

It is true that the Court in Galvan v. Levine, 490 F.2d 1255, 1261 (2d Cir. 1973) approved the denial of a class determination where class relief would be 'largely a formality' because 'the State . . . made it clear that it

understands the judgment to bind it with respect to all claimants; indeed, even before entry of the judgment, it withdrew the challenged policy more fully than the Court ultimately decreed and stated it did not intend to reinstate the policy' no such showing has been made here²⁰ and since Rule 23 grants plaintiffs the right to proceed as a class, they are entitled to do so without demonstrating the necessity of class relief. (Emphasis added) 384 F.Supp. at 811

See also Lugo v. Dumpson, 390 F.Supp. 379 (S.D.N.Y. 1975).

More frequently, however, courts in this Circuit have simply certified classes upon a recitation of facts constituting compliance with Rule 23, without addressing Galvan and its unique facts. See Milne v. Berman, 384 F.Supp. 206, 213 (S.D.N.Y. 1974, Three-Judge-Court) reversed on other grounds sub nom. Lavine v. Milne, 44 U.S.L.W., 4295 (U.S. March 2, 1976) and Lyons v. Weinberger, 376 F.Supp. 248, 263 (S.D.N.Y., 1974).

When in the exercise of its discretion, the District Court finds that an action fulfills the requirements of Rule 23(a)(b)(2) F.R.C.P., a class must be certified. As discussed above, Galvan is consistent with this principle. Furthermore, it is clear that those Courts which have implied that a District Court may require an additional showing of necessity beyond the requirements of the Rule 23(a)(b)(2) have misplaced their reliance on Galvan. The language quoted at

²⁰ Nor in the case at bar. The Court below rejected plaintiff's claims, the challenged practice continues and all issues are hotly contested.

length from Percy v. Brennan, supra. clearly demonstrates this view of the law. The leading case is Fujishima v. The Board of Education, 460 F.2d 1355, 1360 (7th Cir. 1972). Reversing the District Court's denial of a class motion, the Court concisely stated: "If the prerequisites and conditions of F.R.C.P. 23 are met, a Court may not deny class status because there is no need for it" Fujishima has been widely followed. See e.g. Davy v. Sullivan, 354 F.Supp. 1320, 1325 (M.D. Ala., 1973); Youakim v. Miller, 374 F.Supp. 1204, 1207 (N.D. Ill., 1974); Wilson v. Weaver, 358 F.Supp. 1147, 1151 (N.D. Ill., 1973).

Criticism of Fujishima as an overstatement has centered on its application to class actions other than those brought under Rule 23(a)(b)(2). See for example, Wilcox v. Commerce Bank of Kansas City, 474 F.2d 336, 346 (10th Cir. 1973) which involved a Rule 23(b)(3) class action. Subsection (b)(3) of Rule 23, however, requires the Court to determine "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Thus in (b)(3) actions the Court is required to make an additional inquiry and is invested with a degree of latitude neither of which are present in (b)(2). Fujishima in contrast involved a Rule 23(b)(2) class action, as does the instant case, and it is reasonable to assume that the Fujishima Court's expansive language was intended only to apply to Rule 23(b)(2) actions.

In fulfilling Rule 23(a)(b)(2)'s prerequisites the

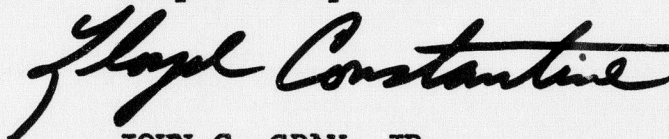
plaintiff implicitly shows the need for class action status. Furthermore, the District Court's observation that class certification would be "procedural surplusage" is incorrect because class certification may protect the future viability of this action. In Sosna v. Iowa, 419 U.S. 393, 399 (1975), the Supreme Court held that the mootness of the named plaintiff's claim did not warrant a dismissal because of the interests acquired by the class upon certification. That decision emphasized the importance of certification and the timing of such determination. This litigation may proceed for a long period of time. The rights of this class might be prejudiced if during the pendency of the litigation the single named plaintiff's claim becomes moot. Depending on the disposition of plaintiff's appeal, there are no fewer than three additional stages where plaintiff may press her claims: A petition for certiorari to the Supreme Court, the review of plaintiff's constitutional claims by a Three-Judge-Court (Decision p. 18, R-18), and review as of right of that Court's determination by the Supreme Court. A class certification is necessary now to protect the interests of a class plaintiff has a right to represent. The lower Court has determined that the Rule 23(a)(b)(2) prerequisites have been fulfilled, thereafter it had no power to deny class action status.

CONCLUSION

For the foregoing reasons, the order of the District Court denying plaintiff's motions for a preliminary injunction and class certification, and granting defendants summary judgment, should be reversed in all respects and remanded for entry of a judgment granting plaintiff class certification, and declaratory and injunctive relief, consistent with plaintiff's prayer for relief.

Dated: May 7, 1976
Brooklyn, New York

Respectfully submitted



JOHN C. GRAY, JR.
LLOYD CONSTANTINE, Of Counsel
Brooklyn Legal Services Corp. B
152 Court Street
Brooklyn, New York 11201
(212) 855-8003

Attorney for Plaintiff-
Appellant

ADDENDUM

R E C O R D

In accordance with the Order of the Honorable William H. Timbers, dated March 25, 1976, Plaintiff-Appellant has complied and photo-copied those parts of the record she has relied upon in her accompanying brief. Four copies of this "record" are filed with the Court and a copy is being served on each opposing party.

The papers of the original documents have been renumbered as follows:

Numbering System

Memorandum and Order of the
Court Below, Pages 1-18, a-c.....R-1--R-21

Order To Show Cause, For T.R.O.,
Preliminary Injunction, Class
Certification etc. with Affidavits,
Exhibits and Interrogatories Annexed.....R-22--R-35.

Verified Complaint.....R-36--R-53

Memorandum and Order In Johnson v.
Likins, No. 4-75-Civ. 318, annexed
as Exhibit "A" to Plaintiff's
Supplementary Memorandum of Law.....R-54--R-100

Letter from H.E.W. to States
Participating In the AFDC program
July 10, 1974 annexed as Exhibit "B"
to Plaintiff's Supplementary Memorandum
of Law.....R-101--R-102

Decision In The Matter Of The
Connecticut Conformity Hearing
(Filed with Court below with
Plaintiff's Memorandum of Law In
Support of Motions for Preliminary
Injunction, etc.).....R-103--R-118

Decision: National Welfare Rights
Organization v. Mathews, No. 75-1741
(U.S. Court of Appeals, Dist. of Col.
1976) unreported decision relied on
in Plaintiff-Appellant's brief).....R-119--R-131

Plaintiff's Supplementary Memorandum
of Law on Motions for Preliminary
Injunction, etc.....R-132--R-161

Defendants' Memorandum of Law
(3 page excerpt).....R-162--R-164

New York State Department of Social
Services - Eligibility Audit Report
December 31, 1974 (filed with Court
below along with Plaintiff's Memorandum
of Law In Support of Motions for
Preliminary Injunction, etc.....R-165--R-179

-----X

Plaintiff-Appellant, Docket No. 76-7102
:
-against- :
:
STEPHEN BERGER, et al., :
:
Defendants-Appellees,

STATE OF NEW YORK)
 : ss.:
COUNTY OF KINGS)

1. I am a member of the bar of this Court and not a party to the action. On the 7th day of May, 1976, I served copies of Plaintiff-Appellant's brief and copies of the Record portions submitted along with the brief on the attorneys for the Defendants-Appellants at the ~~addresses~~ listed below. Service was made by first class, prepaid, United States Mail.

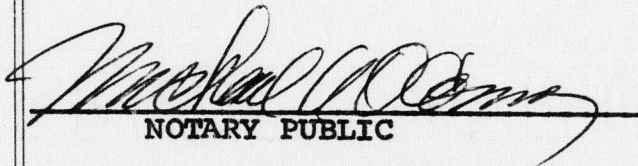
Attn: ROSALIND FINK, ESQ.
Attorney for STEPHEN BERGER and
THE NEW YORK STATE DEPARTMENT
OF SOCIAL SERVICES

CORPORATION COUNSEL OF THE CITY
OF NEW YORK
Municipal Building
New York, New York 10007

Attn: GAYLE REDFORD, ESQ.
Attorney for JAMES DUMPSON and
his successors


LLOYD CONSTANTINE

Sworn to before me this
7th day of May, 1976


NOTARY PUBLIC

MICHAEL A. O'CONNOR
Notary Public, State of New York
No. 31-8190790
Qualified in New York County
Commission Expires March 30, 1978